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15 **UNITED STATES DISTRICT COURT**

16 **NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION**

17 CALIFORNIA APARTMENT
18 ASSOCIATION, STEPHEN LIN,
19 RAKESH and TRIPTI JAIN, ALISON
20 MITCHELL, MICHAEL HAGERTY, &
21 H. ALEX and DANNIE ALVAREZ,

22 Plaintiffs and Petitioners,

23 v.

24 COUNTY OF ALAMEDA, BOARD OF
25 SUPERVISORS OF THE COUNTY OF
26 ALAMEDA, and DOES 1-25,

27 Defendants and Respondents.

28 Case No. 3:22-cv-02705-LB
(Related Case No. 3:22-cv-01274-LB)

29 **REPLY IN SUPPORT OF COUNTY
30 DEFENDANTS' MOTION FOR STAY**

31 The Hon. Laurel Beeler

32 Trial Date: none set

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INTRODUCTION

2 After repeatedly delaying any further action on their remaining claims, Plaintiffs now
3 complain about the “crushing harm” that the County’s proposed stay will allegedly cause
4 them. Plaintiffs own actions belie this hyperbole. They filed suit two years after the mora-
5 toria were adopted and then pursued a strategy of prioritizing their facial claims. When that
6 strategy proved unsuccessful, they doubled down, seeking a lengthy stay of their as-applied
7 claims to allow an appeal. Yet now they argue the claims they elected to defer cannot wait
8 for the Ninth Circuit to resolve appeals that will be argued only *four days* after the hearing
9 on this motion. And while they insist that time is of the essence, they continue to suggest,
10 as they have for months, that they intend to amend their complaints to name new plaintiffs
11 and assert new claims—taking us all back to square one.

12 Moreover, the only harms Plaintiffs would allegedly suffer are monetary, which can
13 be adequately compensated by an appropriately adjusted award if they prevail. On the other
14 hand, as Plaintiffs have acknowledged, denial of a stay would require the parties to proceed
15 with discovery that could be mooted in whole or part by the Ninth Circuit’s decisions.

16 The pending Ninth Circuit cases present a physical takings issue materially identical
17 to one of the central issues in this case. If the Ninth Circuit’s decision is favorable to Plain-
18 tiffs, they would undoubtedly seek reconsideration of the Court’s summary judgment order,
19 which could eliminate the need to proceed with the remaining claims. The Court should
20 therefore briefly stay this case while the Ninth Circuit resolves the pending appeals.

ARGUMENT

I. Plaintiffs will not suffer any damage that warrants denial of this stay, which is less intrusive than the one they sought.

Plaintiffs will suffer no appreciable harm from the County's requested stay. They have repeatedly sought much longer delays of this action and allege only monetary harms, which can be addressed by an appropriate award if they ultimately succeed in their claims.

1 **A. Plaintiffs' repeated efforts to defer their remaining claims are an**
 2 **implicit concession that they will not be harmed by a stay.**

3 Plaintiffs attempt to distinguish their prior request for a *much* longer stay by arguing
 4 that they sought Ninth Circuit review of six claims, not just their physical takings claim.
 5 See Dkt. 68-1 at 6 (Plaintiffs' Joint Opposition to Defendants' Motion for Stay (filed Mar. 24,
 6 2023)) ("Opp."). This argument is a red herring. It ignores the operative fact that Plaintiffs
 7 have been willing to significantly delay resolution of their as-applied claims, and sought to
 8 do so first in their bifurcation motion and again when seeking to take an interlocutory ap-
 9 peal. See Dkt. 57 at 5-6 (County Defendants' Motion for Stay (filed Mar. 10, 2023)) ("Mot.").
 10 Plaintiffs cannot credibly argue that delaying resolution of their remaining claims will harm
 11 them because they have repeatedly sought much longer delays than the one at issue here.
 12 See *id.*; see also *Quinn-White v. Novartis Pharm. Corp.*, No. CV 16-4300 PSG (AGRx), 2016
 13 WL 11519285, at *4 (C.D. Cal. Oct. 7, 2016) (plaintiffs' two-year delay in filing their com-
 14 plaint indicated that further delay would not likely harm them).

15 In any event, Plaintiffs' physical takings claim is not merely one of six claims, but a
 16 core controlling issue in this action—as they have admitted. See *Williams* Dkt. 101 at 9
 17 (Plaintiffs' Motion to Certify the Interlocutory Decision for Appeal and For a Stay (filed Dec.
 18 29, 2022)) ("Mot. to Certify")¹ ("First, the physical takings question is a controlling, novel
 19 issue of law"). In their motion for summary judgment, Plaintiffs dedicated over a third of
 20 their argument to this issue. See Dkt. 25 at 18-25 ([Corrected] Plaintiffs' Motion for Sum-
 21 mary Judgment or Partial Summary Judgment on Facial Claims (filed Jul. 18, 2022)). Like-
 22 wise the physical takings issue constituted nearly a third of their argument on reply. See
 23 Dkt. 36 at 8-20 (Plaintiffs' Reply in Support of Summary Judgment or Partial Summary
 24 Judgment on Facial Claims (filed Sep. 13, 2022)). Additionally, and as the Court found, the
 25 physical takings issue was the *only* controlling legal question that could have justified an

26
 27 ¹ Plaintiffs joined and incorporated this motion. See Dkt. 48 (Plaintiffs' Joinder in Motion
 28 for Certification of Interlocutory Appeal (filed Dec. 29, 2022)).

1 interlocutory appeal. Dkt. 55 at 10 (Order Denying Motion to Certify Summary Judgment
 2 Order for Interlocutory Appeal (filed Feb. 24, 2023)) (“Order”). Ninth Circuit input on this
 3 question will be the most consequential.

4 Even in their opposition, Plaintiffs demonstrate continued willingness to delay fur-
 5 ther proceedings. They note, over a year after filing their complaint, that they “intend to
 6 seek amendment of their complaint to *add new causes of action . . . and join multiple* addi-
 7 *tional housing providers.*” Opp. at 9 (emphases added). Such amendments will delay discov-
 8 ery and any future resolution by months. This directly contradicts their contention that they
 9 “have sought the most expeditious and efficient relief available.”² *Id.* at 6.

10 **B. Any additional damage Plaintiffs will suffer during the stay is purely
 11 monetary and can be adequately compensated at a later date.**

12 Plaintiffs argue they will suffer “continued substantial damage” if a stay is granted.
 13 *See* Opp. at 3-4. However, Plaintiffs identify only monetary damages such as unpaid and
 14 lost rents, mortgage payments, and medical costs. *See* Opp. at 4-5; Dkt. 68-2 at 2 (Declara-
 15 tion of John Protopappas (filed Mar. 24, 2023)); Dkt. 68-3 at 2-3 (Declaration of John Wil-
 16 liams (filed Mar. 24, 2023)). It is well-established that “mere delay in monetary recovery is
 17 an insufficient basis to deny a stay.” *Gustavson v. Mars, Inc.*, No. 13-cv-04537-LHK, 2014
 18 WL 6986421, at *3 (N.D. Cal. Dec. 10, 2014) (citing *Lockyer v. Mirant Corp.*, 398 F.3d 1098,
 19 1110-12 (9th Cir. 2005)).

20 Plaintiffs draw a distinction between past and future monetary damages. Opp. at 5.
 21 But this distinction lacks a difference.³ *Broadcom Corp. v. Sony Corp.*, No. SACV 16-1052

22
 23 ² Plaintiffs first mentioned amending their complaints at the September 29, 2022 summary
 24 judgment hearing. *See also* Mot. to Certify at 10-11 (“should the case proceed forward, it is
 25 anticipated that additional rental property owners may be added as plaintiffs”).

26 ³ None of the cases Plaintiffs attempt to distinguish relied on this distinction. *See CMAX, Inc. v. Hall*, 300 F.2d 265, 268-69 (9th Cir. 1962) (granting stay when “relief . . . is money
 27 damages”); *RLI Ins. Co. v. ACE Am. Ins. Co.*, No. 19-CV-04180-LHK, 2020 WL 1322955, at
 28 *4 (N.D. Cal. Mar. 20, 2020) (“delay in recovery of damages is not the kind of prejudice which
 (footnote continued on next page)

1 JVS (JCGx), 2017 WL 7833636 (C.D. Cal. Feb. 13, 2017), which Plaintiffs cite, is inapposite.
 2 The alleged damage there resulted from patent infringement. Under the relevant statute,
 3 determining the appropriate measure of damages required the court to inquire about the
 4 reasonableness of potential royalties. *Id.* at *2. The court also noted that the claim at issue
 5 was not asserted in the pending appeal, and thus the appeal's impact would likely be mini-
 6 mal. Accordingly, all three *Landis* factors weighed against a stay. *Id.* at *3. By contrast,
 7 here, the Ninth Circuit appeals are directly relevant to this case, and any current or future
 8 damages can be easily measured and adjusted to account for delay in recovery. And in fact,
 9 Plaintiffs have calculated the monetary damages they seek. Opp. at 4-5. Courts have found
 10 that such potential future monetary damages do not warrant denial of a stay. See *Goro v.*
 11 *Flowers Foods, Inc.*, No. 17-CV-2580 JLS (JLB), 2020 WL 804841, at *2 (S.D. Cal. Feb. 18,
 12 2020) (granting stay where plaintiffs alleged "continuing harm"). This is true even where
 13 delay in monetary relief may have unintended impacts on plaintiffs. See *Quinn-White*, 2016
 14 WL 11519285, at *4 (rejecting argument that faster resolution of the case was necessary to
 15 mitigate plaintiff's inability to pay for medical treatment because "recovery [wa]s not guar-
 16 anteed").⁴

17 Moreover, tenants are not relieved of their obligation to pay rent and landlords may
 18 still evict tenants to reoccupy their units under the Ellis Act. Alameda County Code
 19 § 6.120.090(A). Under the County's moratorium, landlords may also collect rent that became
 20 due during the local emergency after one year from when the rent became due. Alameda
 21 County Code § 6.120.090(D). Regardless, ultimately any further damages are monetary and
 22 may be adequately compensated at a later date.

23

24 *Pena v. Taylor Farms Pac., Inc.*, No 2:13-cv-01282-KJM-AC, 2015 WL 5103157, at *6 (E.D.
 25 Cal. Aug. 31, 2015) ("The plaintiffs seek only damages").

26 ⁴ Plaintiffs also hyperbolically claim that the moratoria "are effectively permanent." See
 27 Opp. at 9. On the contrary, the County's moratorium will end by operation of law on April
 29. Mot. at 6; Dkt. 58 at 5-6 (County Defendants' Request for Judicial Notice in Support of
 Motion for Stay (filed Mar. 10, 2023)). And Plaintiffs' suggestion that the City's moratorium
 28 will become permanent is pure speculation.

1 Plaintiffs also contend that a stay would prevent them “from pursuing their claims
 2 for injunctive and declaratory relief in this action.” Opp. at 5. However, Plaintiffs do not
 3 explain how such a delay would *harm* them apart from further delaying recovery of mone-
 4 tary damages. Indeed, they have never sought a preliminary injunction to avoid incurring
 5 further damages. In *Gustavson*, the court held that a mere prayer for injunctive relief does
 6 not warrant denying a stay where the plaintiff has not moved for a preliminary injunction
 7 and any prospective relief is unlikely to be awarded prior to a decision in the related appeal.
 8 *Gustavson*, 2014 WL 6986421, at *3; *see also Goro*, 2020 WL 804841, at *2 (“the fact that
 9 Plaintiffs have not moved for a preliminary injunction . . . and did not file their case for
 10 several years” weighed in favor of a stay). A stay is particularly appropriate where the court
 11 of appeal’s resolution of the related appeal may alter the issues in the stayed action and
 12 thus engender more discovery or motion practice. *See Gustavson*, 2014 WL 6986421, at *1,
 13 3 (granting stay in a putative class action because Ninth Circuit decision in a different case
 14 could affect class certification).

15 **C. The early stage of the proceedings supports granting a stay.**

16 Even though the parties have not yet begun discovery, Plaintiffs contend that this
 17 case is already well along. Opp. at 6. This directly contradicts their prior admission—when
 18 they were seeking their own stay—that “[t]his case is also [at] an early stage of litigation.”
 19 Mot. to Certify at 10, 25 (“[T]he fact that it is in the early stages and pre-discovery also
 20 weighs in favor of granting certification”). As Plaintiffs correctly noted, “no discovery has
 21 been conducted.” *Id.* at 10.⁵ Indeed, Plaintiffs have reiterated that they intend to amend
 22 their complaints (Opp. at 9)—including to add new claims—which would return the case to
 23

24 ⁵ Plaintiffs now suggest that this fact weighs *against* a stay. They argue their “as-applied
 25 claims involve fact intensive inquiries that may entail discovery, which should be allowed
 26 to commence immediately.” Opp. at 9. Yet in the very same paragraph Plaintiffs show they
 27 have no intention of “immediately commencing” discovery. Rather, they intend to seek leave
 28 for significant amendments to their complaints. *See id.* Moreover, it is imprudent to proceed
 with discovery while a central controlling issue is pending before the Ninth Circuit. *See infra* Section III.

1 the pleadings stage. Courts regularly grant stays under similar and even less favorable cir-
 2 cumstances. *See Rizvanovic v. United Parcel Serv., Inc.*, No. 1:21-cv-01278-BAK (SKO), 2022
 3 WL 1190263, at *4 (E.D. Cal. Apr. 21, 2022) (granting stay even though discovery requests
 4 had already been propounded); *Hernandez v. San Gabriel Temp. Staff Servs., LLC*, No. 17-
 5 CV-05847-LHK, 2018 WL 1582914, at *9 (N.D. Cal. Apr. 2, 2018) (granting stay during the
 6 pleadings stage).

7 Plaintiffs fail to distinguish *Rizvanovic* and *Hernandez*. They argue those cases “in-
 8 volved stays after the first few months the complaints were filed, and did not involve year-
 9 long efforts to obtain interlocutory appellate review.” Opp. at 6. But those decisions are not
 10 based merely on the time that had elapsed in the litigation; they emphasize how little pro-
 11 gress had been made in prosecuting the claims. In *Rizvanovic*, “no witnesses ha[d] been
 12 deposed, no written discovery ha[d] been responded to, no dispositive motions ha[d] been
 13 filed or heard, and no trial date ha[d] been set.” 2022 WL 1190263, at *4. In *Hernandez*, the
 14 case “[wa]s still at a very early stage,” and the pending appellate decision “ha[d] already
 15 been fully briefed” and argued. 2018 WL 1582914, at *9. Other courts have granted both
 16 longer stays and stays sought years after the complaint was filed. *See Gustavson*, 2014 WL
 17 6986421, at *1, 4 (granting stay requested over two years after complaint was filed); *Skule-
 18 vold v. SD&A Teleservices, Inc.*, No. 2:20-CV-2771-AB (JCx), 2020 WL 7711834, at *5 (C.D.
 19 Cal. Nov. 18, 2020) (granting stay even though appeal would not be heard until Supreme
 20 Court’s next term); *Wolf v. Lyft, Inc.*, No. C 15-01441 JSW, 2015 WL 4455965, at *2 (N.D.
 21 Cal. Jul. 20, 2015) (same).

22 **II. Plaintiffs ignore that denial of a stay will waste resources.**

23 Plaintiffs also contend that Defendants failed to show harm absent a stay. Opp. at 5.
 24 They further argue that “to the extent Defendants imply harm would result simply by being
 25 required to litigate, this claim fails.” *Id.* at 6. To the contrary, the motion discusses the
 26 hardship and “needless litigation” that may come from denial of a stay. *See* Mot. at 7; *see also* Mot. to Certify at 28. And Defendants do not take issue with being required to proceed
 28

1 with litigation, but rather with the likelihood that extensive discovery efforts may be waste-
 2 ful.⁶ Plaintiffs admit that their remaining claims “involve fact intensive inquiries” (Opp. at
 3 9) and will require extensive discovery (Mot. to Certify at 26). That effort may be wasted in
 4 whole or in part if the Ninth Circuit’s forthcoming decision changes the scope of the remain-
 5 ing claims. Thus, where a pending appellate decision could moot much of the ongoing litiga-
 6 tion, Courts have found that “[s]ubstantial, unrecoverable, and wasteful discovery costs”
 7 warrant granting a stay. *Compare Pena*, 2015 WL 5103157, at *4 (granting stay pending
 8 Ninth Circuit appeal) *with Cal. Trout, Inc. v. U.S. Bureau of Reclamation*, 115 F. Supp. 3d
 9 1102, 1117 (C.D. Cal. 2015) (denying stay where there was no pending decision and defend-
 10 ants merely sought more time to correct deficiencies).

11 **III. A Ninth Circuit decision will simplify a central issue in these cases—as**
12 Plaintiffs effectively admitted when they sought a stay to allow an
13 interlocutory appeal.

14 Again, despite seeking Ninth Circuit review of the same physical takings question at
 15 issue in the pending appeals, Plaintiffs argue that the “orderly course of justice” factor does
 16 not support a stay because a Ninth Circuit decision “will only involve one potentially con-
 17 trolling question of law here.”⁷ Opp. at 8. But both the Court and Plaintiffs have concluded
 18 that the physical takings issue—the same issue before the Ninth Circuit—is a controlling
 19 question of law here. *See* Mot. to Certify at 14-15 (“whether the Defendants’ eviction bans
 20 are an unconstitutional physical taking is a controlling issue of law”); Order at 11 (“*El Papel*

21 ⁶ Plaintiffs also cite *Lockyer v. Mirant Corp.*, 398 F.3d 1098 (9th Cir. 2005). *See* Opp. at 6.
 22 *Lockyer* is inapposite. In that case, the court found that that the potential harm resulting
 23 from the stay would be substantial while “it [wa]s highly doubtful” that the concurrent bank-
 24 ruptcy court proceeding would resolve the district court action. *Lockyer*, 398 F.3d at 1112.
 25 Additionally, the court had already found that an automatic stay under a separate statutory
 26 regime would not be appropriate and noted that the court was “aware of no case . . . in which
 a district court has entered a *Landis* stay” where the automatic stay did not apply. *Id.* Here,
 however, a stay will not harm Plaintiffs and the pending Ninth Circuit appeals involve the
 precise question of which Plaintiffs themselves sought review.

27 ⁷ Plaintiffs also grossly misrepresent the length of the County’s requested stay. Opp. at 8.
 28 The County never asked the Court to await a decision by the Supreme Court (on a petition
 for certiorari that might never be filed).

1 presents the same ‘controlling question of law’ . . . : what legal standard applies in analyzing
 2 whether COVID-19 eviction moratoria are *per se* takings?”). Unlike in the cases Plaintiffs
 3 rely on, the question now before the Ninth Circuit is not merely “one of several issues” in
 4 this case. *See* Opp. at 7-8 (citing *Larson v. Harman Mgmt. Corp.*, No. 1:16-cv-00219-DAD-
 5 SKO, 2017 WL 3172979, at *3 (E.D. Cal. Jul. 26, 2017); *Perry v. Bloomberg*, No. 1:15-cv-
 6 00408-CL, 2015 WL 3542773, at *3 (D. Or. Jun. 4, 2015); *Duncan v. Becerra*, No. 3:17-cv-
 7 1017-BEN, 2017 WL 4518498, at *2 (S.D. Cal. Oct. 10, 2017)). Rather, it is a central issue,
 8 and one on which Ninth Circuit input will be particularly clarifying. *See supra* Section I.A.

9 Plaintiffs further contend that the moratoria at issue in the pending appeals are “sub-
 10 stantively different” from the moratoria challenged here and “it is highly possible” that the
 11 decision will “have no applicability to Plaintiffs’ cases.” Order at 8. Again, this Court has
 12 already found the opposite to be true. *See* Order at 11. All three pending cases involve chal-
 13 lenges to COVID-19 eviction moratoria and “[l]ike the moratoria in the present cases, the
 14 moratoria in *El Papel* limited the landlords’ right to exclude . . . without eliminating the
 15 tenants’ legal obligation to pay rent.” *Id.*

16 Plaintiffs then allege that “at best” a Ninth Circuit decision “may revive” their facial
 17 physical takings claim or may simply be irrelevant to this case. Opp. at 8. Indeed, a ruling
 18 favorable to Plaintiffs could completely change the scope of this litigation. *See* Mot. at 7-8.
 19 When Plaintiffs sought to bifurcate their facial and as-applied claims, they argued that suc-
 20 cess on their facial claims “would significantly narrow or possibly moot the as-applied
 21 claims.” *Williams* Dkt. 46 at 7 (Plaintiffs’ and Petitioners’ Consolidated Reply in Support of
 22 Motion for Bifurcation of Facial and As-applied Claims (filed May 17, 2022)). And as Plain-
 23 tiffs previously argued, regardless of the outcome, a ruling “could allow for productive set-
 24 tlement discussions and a significantly shortened litigation.” Mot. to Certify at 11. Accord-
 25 ingly, a stay would benefit the orderly course of justice. *See Gustavson*, 2014 WL 6986421,
 26 at *3 (granting stay where “Ninth Circuit’s decision is likely to provide substantial guidance
 27 . . . that will materially impact the Court’s decisions in the instant case.”); *Skulevold*, 2020

1 WL 7711834, at *5 (even where “there [wa]s no guarantee the Supreme Court will resolve
2 the issue at hand, it [wa]s nonetheless certainly possible that the Supreme Court will pro-
3 vide some guidance generally”).

4 **CONCLUSION**

5 For the reasons set forth above and in the County’s motion, the Court should stay all
6 further proceedings until the Ninth Circuit rules in *El Papel, LLC v. City of Seattle*, No. 22-
7 35656 (9th Cir. docketed Aug. 17, 2022); *Jevons v. Inslee*, No. 22-35050 (9th Cir. Docketed
8 Jan. 18, 2022); and *Iten v. County of Los Angeles*, No. 22-55480 (9th Cir. Docketed May 12,
9 2022).

10

11 DATED: March 31, 2023

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